DATE: April 4, 1996

CASE NO: 95-CAA-00007

In the Matter of

BRIAN L. HOLTZCLAW

Complainant

v.

COMMONWEALTH OF KENTUCKY NATURAL
RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET

Respondent

COALITION FOR HEALTH CONCERN
JUSTICE RESOURCE CENTER
OHIO RIVER VALLEY ENVIRONMENTAL COALITION
SOUTHERN ORGANIZING COMMITTEE FOR
ECONOMIC AND SOCIAL JUSTICE

Intervenors

Appearances:

Stephen M. Kohn, Esq.
David K. Colapinto, Esq.
Veronica Villanueva, Esq.
For Complainant

David Tachau, Esq.
Brenda J. Runner, Esq.
For Respondent

Corrinne Whitehead
Louis Coleman
Laura Forman
Anne Braden
For Intervenors

Before: Ainsworth H. Brown
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises out of a complaint, filed by Brian L. Holtzclaw (hereinafter "Complainant"), alleging violations of the employee protection provisions of the following statutes: the

Clean

Air Act, 42 U.S.C. section 7622; the Safe Drinking Water Act, 42 U.S.C. section 300j-9; the Solid Waste Disposal Act, 42 U.S.C. section 69713; the Water Pollution Control Act, 33 U.S.C. section 1367; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. section 9610; and the Toxic Substances Control Act, 15 U.S.C. section 2622. These six acts contain similarly worded employee protection provisions (or "whistleblower provisions"), prohibiting employers from discharging, discriminating, or otherwise penalizing their employees who initiate suits, testify against their employer, or otherwise involve themselves in administrative or legal proceedings under the acts.

Complainant worked for the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet (hereinafter "KDEP") pursuant to an Intergovernmental Personnel Act agreement, or "IPA" (described in greater detail below) with the United States Environmental Protection Agency (hereinafter "EPA"). His complaint alleges that he was:

> subjected to harassment and other retaliatory acts by my employers, the U.S. EPA[1] and the Kentucky DEP. Because of my whistleblowing activities, I have been subjected to a "hostile work environment." Additionally, on November 18, 1994, I was informed by the U.S. EPA that the Kentucky DEP would not be renewing my employment contract on December 22, 1994.

A hearing was held before me in Louisville, Kentucky from November 2 through November 8, 1995, at which time the parties were given full opportunity to present evidence and argument as provided in 29 C.F.R. Part 24. The record was left open after the hearing to permit the submission of post-hearing briefs and certain deposition testimony. Complainant and Respondent each submitted 2 post-hearing briefs[2]

ISSUES

The issues to be resolved are:

1. Whether Complainant was subjected to a "hostile work environment" in violation of the employee

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[1] Complainant settled with EPA prior to the hearing.

[2] The following references will be used herein: Tr for hearing transcript; Cx for Complainant's exhibit; Rx for Respondent's exhibit; ClBr and ClBrII for Complainant's post-hearing brief and Complainant's post-hearing response brief, respectively; and RBr and RBrII for Respondent's post-hearing brief and Respondent's post-hearing response brief, respectively.

protection provisions of the Clean Air Act, the Safe Drinking Water Act, the Solid waste Disposal Act, the Water Pollution Control Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and/or the Toxic Substances Control Act; and

2. Whether Respondent's decision not to renew Complainant's employment contract violated the employee protection provisions of the Clean Air Act, the Safe Drinking Water Act, the Solid waste Disposal Act, the Water Pollution Control Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and/or the Toxic Substances Control Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FACTUAL SUMMARY

A. Background

Complainant began working as an environmental engineer for U.S. EPA Region 4 in Atlanta, Georgia, on June 5, 1988. (Cx 1.) Prior to coming to the EPA, Claimant worked as a quality engineer for Union Carbide in Columbus, Georgia. (Tr at 548.) He also participated in a cooperative education program while studying engineering at the Georgia Institute of Technology from 1979-1983, and worked for Air Products and Chemicals and Monsanto through that program. (Tr at 547.) Complainant was supervised at the EPA by H. Kirk Lucius, Branch Chief of the Environmental Engineering Division, at all times relevant herein. (Tr at 552.)

In 1987, Kentucky initiated studies to analyze the cumulative impacts of industries on the environments and public health in three geographic areas within the state: the Calvert city area in western Kentucky; the Ashland area in eastern Kentucky; and southwest Jefferson County, where Louisville is located. These studies were referred to as "geographic initiatives." The geographic initiatives led to KDEP's involvement as the lead agency in two larger community-based geographic initiatives: the "Tri-State Geographic Initiative" (hereinafter "TSI") and the "Calvert City Initiative" (hereinafter "CCI").

These initiatives forged a partnership between Federal, State, and local agencies, as well as private industry and local citizens, in order to further the goals of environmental management.

The Tri-State Initiative involved a 6-county area along the Ohio River Valley, where Kentucky, Ohio and West Virginia meet.

The area has high rates of pollution released by the industries located along the Ohio River. Included among the governmental agencies involved in the TSI are: KDEP; Ohio Environmental Protection Agency; West Virginia Division of Environmental Protection; United States Environmental Protection Agency Regions 3, 4, and 5 (Philadelphia, Atlanta, and Chicago, respectively); Ohio River Valley Water Sanitation Commission (ORSANCO); Portsmouth (Ohio) Local Air Agency; Agency for Toxics Substances and Disease Registry (ATSDR); Greenup and Boyd Counties in Kentucky; Wayne and Cabell Counties in West Virginia; Lawrence and Scioto Counties in Ohio; and the cities of Ashland, Kentucky, Huntington, West Virginia, and Ironton, Ohio.

The Calvert City Initiative involves a smaller area centered around a group of approximately 12 chemical plants in an industrial complex near the Tennessee River. CCI also involved several participating Departments and Agencies, including: KDEP Division of Water, KDEP Division of Air Quality, KDEP Division of Waste Management, KDEP Paducah Field Office, GIS Branch, EPA Region 4, ATSDR, U.S. Geological Survey, Murray State University's Mid-Atlantic Remote-Sensing Center, ORSANCO, and the Tennessee Valley Authority. (Cx 48.)

KDEP's Deputy Commissioner, Russell Barnett, had primary responsibility for the Tri-State and Calvert City Initiatives. Dr. David Morgan originally served as the Initiatives' Coordinator. Dr. Morgan had drafted a study plan and outlined an organizational structure for TSI, including a "Citizens Advisory Group," technical teams, and a "Technical Steering Committee." (Rx 68.) Dr. Morgan accepted new responsibilities within KDEP in late 1992.

At the time of Dr. Morgan's promotion, Kentucky was under a "very stringent hiring freeze" on filling state positions. (Tr at 275-276.) Therefore Barnett suggested filling the vacancy through an "Intergovernmental Personnel Act" agreement, or "IPA." An IPA is an agreement under which a federal agency "loans" an employee to a state agency, or vice-versa. The maximum term for which a federal employee may serve under an IPA during his career is four years. (Tr at 61.) Barnett was familiar with IPA arrangements, as he himself had originally come to work for KDEP pursuant to an IPA, before joining as a permanent employee. (Tr at 59.)

Barnett contacted Joe Franzmathes, Director, EPA Region 4 Waste Management Division, who suggested Complainant for the position. Complainant was interviewed by Barnett, and Kentucky subsequently entered an IPA with the EPA, under which Complainant began serving as "Geographic Initiatives - Project Manager," (Cx

3[3]), for a two-year period beginning December 21, 1992. The IPA contained no provision for an extension of the two-year term, and Kentucky retained the discretion to terminate the IPA at any time. (Id.) Under the IPA, 49% of Complainant's salary was paid by the EPA and 51% was paid by the State of Kentucky. Complainant received a bonus which was paid entirely by the State of Kentucky, and his benefits were paid entirely by the EPA. (Tr at 64.)

B. The "Dr. Stockwell" Controversy

The TSI's Technical Steering Committee determined to engage in a "Risk Screening" project in order to determine where to place a finite number of air monitoring stations, which Kentucky had purchased for over $300,000. (Tr at 1309.) Risk Screening was necessary not only in order to pinpoint the locations within the 2300 square mile tri-state area to place the air monitoring stations, but also to prioritize area generally for pollution prevention and other risk reduction efforts. (Tr at 595.) The area was broken down into clusters, consisting of multiple industries in a particular location. (Tr at 178.) Each cluster was to be rated based upon a number of environmental factors, depending on the particular risk-screening methodology employed.

Several risk screening methods were proposed, but Complainant determined to primarily employ the "TIP" method[4]. Kentucky's chief risk assessment scientist and team leader of the risk screening project, Dr. Albert Gene Westerman, recommended that other methodologies be included[5].

Complainant was convinced; however, that the TIP method was most appropriate, and he had less faith in the methods proposed

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[3] Complainant's position was commonly referred to as "Project Coordinator." (Tr at 575.)

[4] The TIP approach rates particular chemicals according to the number adverse health effects which they produce in humans, such as chronic and reproductive toxicity. (Tr at 598.) The TIP score is then multiplied by the mass of the chemical which is released into the environment by industry in a particular area, to determine the relative risk of particular chemicals in the area.

[5] Dr. Westerman explained that his concern with the TIP method was that it did not sufficiently account for varying levels of toxicity among different chemicals, rating highly toxic chemicals on the same level as less toxic ones. (Tr. at 222.) Dr. Westerman therefore persuaded Complainant to include other methodologies in the risk screening report which was eventually released in September, 1994. (Rx 33.)

by Dr. Westerman. (Tr at 219.) The TIP methodology was developed by Dr. John Stockwell, a Public Health Service physician on assignment with the EPA. (Tr at 219.) Complainant had worked with Dr. Stockwell for 3-4 months while at EPA Region 4. In addition to developing the TIP method, Dr. Stockwell, along with EPA's Jerry Sorenson, had performed "groundbreaking work" incorporating "GIS," a computer technology used to map environmental information to assist with visual presentation of such information for analysis. (Tr at 594.)

Complainant had become familiar with Dr. Stockwell's work regarding the TIP method in late 1992, and began efforts to obtain Dr. Stockwell's participation and collaboration in the TSI's risk screening efforts in July, 1993. (Tr at 602.) Complainant had scheduled a Risk Analysis Conference for August 27, 1993, and sought Dr. Stockwell's participation at that conference. With the consent of the Risk Analysis Team and the GIS Team, Complainant contacted Jewell Harper, Chief of the Air Enforcement Branch of EPA Region 4, who agreed that Dr. Stockwell would attend the conference. (Cx 10; Tr at 605.) Barnett and Logan also supported Complainant's request for Dr. Stockwell's participation at that time, (Cx 9), and Barnett in fact offered to have KDEP pay for Dr. Stockwell's travel expenses in attending the August 27 conference, (Tr at 1296-1297). Complainant was aware, at this time, of a grievance which Dr. Stockwell was involved in with the EPA; however, Barnett had no knowledge of the situation.

Approximately one week before the Risk Analysis Conference, Harper telephoned Complainant and informed him that Dr. Stockwell would not be attending. (Tr at 604.) Dr. Stockwell assisted Complainant in selecting a replacement, who was flown in from Kansas City (EPA Region 7) at EPA Region 4's expense. The replacement was not a toxicologist, and Complainant did not feel that she had a sufficient "appreciation of ... the array of human health kind of issues and emphasis ... needed in the region ... [and] it seemed like she did not have a lot of experience in risk screening." (Tr at 606.) Therefore, Claimant did not feel that she was an effective substitute for Dr. Stockwell's participation. (Id.)

Dr. Stockwell continued to assist Complainant through phone consultations, regarding the TSI through October, 1993. These consultations continued despite an alleged request from Complainant's second-line EPA supervisor, Bill Patton, on August 23, 1993, that he stop calling Dr. Stockwell. (Tr at 919.) Complainant continued to communicate with Dr. Stockwell from Dr. Stockwell's home phone, rather than through the EPA. (Tr at 621.)

Barnett was apprised of Dr. Stockwell's grievance situation with the EPA in October, 1993. (Rx 9.) Barnett claims that he

expressly directed Complainant to stop requesting Dr. Stockwell's participation at this point, however Holtzclaw denies that he was ever told to stop attempting to secure Dr. Stockwell's participation prior to January, 1994. (Tr at 619.)

Complainant became concerned about "escalating interference from EPA Region IV managers who, apparently, did not share (or actively opposed) the use of Dr. Stockwell's environmental public health concerns." (ClBr at 22.) On his own initiative, he thus prepared a 16-page document he titled "The Dr. Stockwell Brief" (hereinafter "the Stockwell Brief"). (Rx 58.) An "Executive Summary" portion of the Stockwell Brief explains:

> The purpose here is to give KDEP management knowledge of specific unsuccessful efforts to secure this Regional Human Health Effects Officer on behalf of the Tri-State Geographic Initiative. Kentucky's management will form their own evaluation of this information presented herein and decide on the next course of action. It is hoped that the U.S. EPA Region IV APTMD will reconsider this important matter of allowing Dr. Stockwell to travel and consult with the KDEP.

(Id. at 3.) In addition, the cover of the brief contains the following "credits:"

> Prepared by: The Kentucky Department for Environmental Protection (KDEP); Commissioner's office
>
> Prepared for: Russ Barnett, Deputy Commissioner, KDEP and Phillip Shepherd, Secretary, Cabinet for Natural Resources and Environmental Protection

(Id at 1.) Complainant's administrative assistant, Aaron Keatley, claimed that Complainant spent approximately 70% of his time during the fall of 1993 on the Stockwell matter. (Tr at 1099.)

On January 24, 1994, Complainant provided Barnett with a copy of the Stockwell Brief. (Cx 28.) He also provided two versions of a draft letter written for Shepherd to sign and send to John H. Hankinson, Jr., Regional Administrator of EPA Region 4. Complainant referred to the first letter as "the hardcore version," which took a strong tone in requesting Dr. Stockwell's participation with the Tri-State Initiative. The second was referred to as "the softcore version," and it took a milder tone in making the request. (Cx 26.) The cover sheet which Complainant provided with the letters indicated that Complainant wanted to send the letter as soon as possible, "<u>if you are in agreement</u>." (Id.)

The next day, January 25, 1994, Complainant sent a copy of the Stockwell Brief (federal express) to Dr. Stockwell, under cover which read: "This report was prepared as directed by my management

here @ KDEP ... Yours to use if needed." (Rx 58.)

Later that same day, on January 25, 1994, Complainant met with Barnett to discuss the Stockwell Brief and the suggested letters. Complainant testified that Barnett was supportive of his actions, but told Complainant that he would not officially back him up, and that he would be "on his own" if he sent the brief. (Tr at 621.) Barnett maintains that he told Complainant not to distribute the brief or the letters, because Dr. Stockwell's grievance was an internal EPA personnel matter. (Tr at 1301-1302.) Complainant did not inform Barnett, at that time, that he had already sent a copy of the Brief to Dr. Stockwell.

After that meeting, Barnett phoned Hankinson at EPA and told him that Complainant would be available to talk with federal investigators about Dr. Stockwell. (Tr at 1299.) Barnett then prepared a memorandum instructing Complainant not to send either of the draft letters to the EPA and to "hold off on the phone calls asking for Stockwell." (Cx 29; Rx 12.)

Based upon the January 25, 1994 meeting, Complainant contacted Dr. Stockwell the next day, on January 26, 1995, and instructed Dr. Stockwell to contact him before "taking any action" with respect to the brief. (Cx 28.) Complainant had a phone conversation with Dr. Stockwell at his home, apparently later that same day, in which Complainant again told Dr. Stockwell not to distribute the brief within the EPA and to give it directly to the Inspector General's office[6]. (Tr at 637.) Dr. Stockwell subsequently sent a copy of the brief to the Inspector General's office on January 27, 1994.

On January 31, 1994, an EPA employee discovered some portion of the Stockwell Brief at a copy machine, and noted that it appeared to be an official KDEP document and that it was rather critical of the EPA. The employee gave the document to Mr. Bruce Perry Miller, EPA Region 4's Deputy Director, Air Pesticides, and Toxic Management Division, Dr. Stockwell's supervisor. Miller telefaxed a copy of the brief to Phillip Shepherd, KDEP's Commissioner, who had no prior knowledge of the brief's existence. (Tr at 285-289.)

Shepherd then asked Barnett about the Stockwell Brief, either that same afternoon or the next morning. (Id.) Barnett met with Complainant on February 1, 1994 and informed Complainant that the Stockwell Brief had been circulated throughout the EPA. (Tr at 649.) Barnett told Complainant that he was preparing a memorandum to Shepherd explaining the circumstances surrounding the Stockwell Brief, which he ultimately prepared later that day. (Rx 10.)

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[6] The Inspector General's office was in charge of investigating Dr. Stockwell's grievance.

After meeting with Barnett, on February 1, 1994, Complainant prepared a memorandum recounting the meetings between himself and Barnett over the past week or so, regarding the Stockwell Brief. (Cx 32.)

Complainant then went to see Shepherd, still on February 1, 1994, to inform him of the situation. (Tr at 650.) Shepherd explained his concerns about the brief to Complainant. (Tr at 289-293.) Shepherd explained that his fundamental concern was that Complainant had circulated the document "under the auspices of Kentucky state government ... [giving it] the color of an official position on the part of Kentucky." (Id.) Shepherd explained that he was also concerned about the tone of the document and its reliance on rumor, innuendo and anonymous sources. (Id.) Complainant offered to resign, but Shepherd responded that he should just "do his job," focussing on the goals of the initiatives. (Tr at 299-300; Rx 3; Rx 10.)

The next day, (Tr at 367), Shepherd received a phone call from Mr. Mick Harrison, of the Government Accountability Project ("GAP"). Mr. Harrison referred to federal whistleblower protection laws and warned Shepherd that Complainant was protected by those laws.

On either late February 1, 1994 or February 2, 1994, Barnett provided Complainant with a draft of the memorandum he was preparing for Shepherd, outlining what he knew regarding the brief. Complainant suggested a few changes and returned the memo to Barnett with his revisions and a note at the top, reading "Russ, overall good job, fairly accurate." (Rx 28.) Later that day Complainant contacted Harrison (of the Government Accountability Project) to explain that he felt he was being judged and admonished unfairly by Barnett and Shepherd, and felt that he might need assistance. (Tr at 660-661.)

On February 9, 1994, Complainant conducted a telephone conference with TSI's Technical Steering Committee, to "update the situation." (Tr at 662.) Complainant read a prepared statement, explaining that a "significant portion" of his time was "preoccupied" with obtaining the services of Dr. Stockwell and that this "unexpectedly demanding" endeavor "took time from other aspects of managing the risk screening, air toxics, pollution prevention, and surface water projects." (Cx 33.) He further explained that:

> As an agent of the United States Government and the State of Kentucky, I have an obligation not only to uphold the constitution and federal and state statutes and regulations but also to disclose impediments to our common mission to protect human health and the environment. I have made a decision to do the honorable and right thing and report my observations to federal

> investigators. I have done this despite the real threat of retaliation from official sources who might be involved in misconduct, desire to cover for another's misconduct or simply be offended by my frank disclosures. I hope you're still with me.

(Cx 33.) Complainant, after obtaining consent from all participants, had tape-recorded this conference call. A copy of the recording was later provided to Miller, at EPA Region 4, who had Complainant's remarks transcribed. (Cx 114 at 58.)

On February 16, 1994 Complainant recorded a conversation between himself and Barnett, wherein Barnett informed Complainant of the phone call Shepherd received from Harrison. (Tr at 666.)

The next day Complainant prepared a memorandum to Barnett, requesting written guidelines outlining his orders regarding Dr. Stockwell. The memo continued:

> If you should issue a written order instructing me to drop my requests for Dr. Stockwell's assistance, understanding my position on Dr. Stockwell's unique ability to assist with my Risk Screening Project, I would not be insubordinate and disobey this direct order ... I am aware of my rights to appeal such an order and seek its reversal through the appropriate chain of command and through any oversight agency or legislative body established by law.

(Cx 39.) Complainant provided copies of the memorandum to Logan, Shepherd, Hankinson, Lucius, Harrison and Rick Condit (of GAP.) (Tr at 669.) On February 18, 1994 Complainant presented a copy of the memo to Barnett. (Tr at 669.)

Barnett told Complainant that he would require an observer on all conference calls, would require an observer on every trip he took, and all correspondence was to be reviewed and signed off by himself. Complainant surreptitiously tape recorded this conversation with Barnett. (Tr at 670.)

Complainant did not receive any response to his request for written orders, and on March 10, 1994 he provided Barnett with a "friendly reminder" of this request, in writing. (Cx 40.) The memo also requested a copy of a letter which Shepherd had written to Hankinson regarding the Stockwell Brief. Barnett eventually left a copy of the letter in Complainant's box, along with a copy of the February 1, 1994 letter he had written apprising Shepherd of what he knew of the Stockwell situation. (Cx 38.)

In late February, 1994, Claimant sent a "One Year Report Card" to participants of the TSI, the technical assistance teams, the Citizens' Review Committee and the Technical Steering Committee.

(Rx 48.) The Report Card requested an evaluation of Complainant's performance and explained that the information would be shared with KDEP management and EPA Region 4, and Complainant provided an outline of "possible subjects" for the responses to cover. Complainant also included suggested language: "assortment, rapport, integrity, intelligence, innovation, leadership, scientific approach, dedication to Initiative, work ethic, dedication to mission for improving public health & environment, professionalism, commitment to public service, etc." (Id.)

In a similar undated memorandum (addressed to "Connie and Jackie"), Claimant provided even more suggested language, praising himself, to be used in letters of "review", including:

> "your dedication to public outreach ... has been invaluable to SOC and the afflicted peoples of environmental racism";
>
> "were it not for you + adjective ... and your status as a dedicated state and federal employee, our grassroots organization would not have benefitted";
>
> "please say a few good words about me as a public servant ... here's some choices: pollution prevention emphasis, fairness, integrity, conscience, partnership, leadership, restoring public trust, environmental education, encouragement of diverse viewpoints, blah, blah your choice!!!!!!!!!!!!!!!!"; and
>
> "SOC appreciate[s] you and ... hope your management (Mr. Russ Barnett and Phillip Shepherd) within the [KDEP] appreciates and recognizes your value. Your good works behind the scenes has helped propelled this national issue ahead, at a faster pace than it would have without you ... serve the public with ... talent, etc."

(Rx 52.) In late April, 1994, Complainant compiled "some highlights" of the comments he received, into a document he titled "Recent Reviews of Tri-State Geographic Initiative (TGI) and the Coordinator." (Cx 44.)

C. Complainant's EPCRA Letter

During the Summer, 1993, Complainant and Barnett met with John Deutsch, at EPA Region 4. Deutsch is responsible for implementing the federal Emergency Planning and Community Right to Know Act ("EPCRA"). (Tr at 154.) EPCRA provides for an opportunity for an industry to reduce a proposed fine by undertaking a Supplemental Environmental Project, or "SEP." (Tr at 155-156.) EPA Region 4 was conducting negotiations with Ashland Oil, regarding an enforcement action for violations which occurred in Ohio and West Virginia. Kentucky had no official involvement in the matter, as

the matter involved no reported violations in Kentucky. (Tr at 157.)

On April 21, 1994, Complainant wrote a letter to Mr. Deutsch, stating: "This is a request to become formally involved in your [Ashland Oil] negotiation process." (Cx 45.) Complainant was concerned that the SEPs being considered were not "substantial enough to effect enough positive change." (Tr at 697.) Mr. Deutsch and an EPA attorney phoned Barnett to find out why Kentucky wanted to intervene "formally," since no violations in Kentucky were involved. Barnett explained to Deutsch that Complainant had "mis-spoken" and that Kentucky had no official interest in the matter. (Tr at 158.)

D. May 13, 1994 Memorandum

On May 13, 1994, Barnett met with Complainant to discuss a memorandum which Barnett had prepared that day. (Cx 51.) The two discussed the entire memorandum, point by point. (Tr at 739.)

The memo noted "critical environmental issues" which Barnett claimed Complainant had not addressed, jeopardizing grant monies and the goals of these projects. (Cx 51 at 1-2; Tr at 1304-1306.) Barnett thus requested a "specific work plan of tasks that need to be accomplished, a schedule on when the tasks are to be completed, and a budget to indicate what resources are needed to continue the studies as well as account for resources expended to date." (Id.) The memo also addressed Complainant's alleged abuse of overnight delivery services, and instructed Complainant to reimburse Kentucky $76.00 for these charges, and to have any future overnight deliveries prepared by another employee. (Cx 51 at 3.) The memo also addressed Complainant's "excessive amount of time spent on the telephone," and instructs Claimant to "keep a log of all of [his] calls ... [and to] limit [his] calls to extension at 120 or if they are personal calls to the pay telephone in the lobby." The memo also addressed Complainant's alleged failure to comply with standard travel protocols. (Cx 51 at 4.) Finally, the memo explained Barnett's concerns over Complainant's request to become "formally involved" in the EPCRA matter. Complainant felt that every criticism in the memo was unfounded and that the memo generally mischaracterized the work he had done.

On May 28, 1994, Complainant prepared a memorandum to Barnett to verify that the May 13, 1994 memo was personal, and to verify that it would not be placed in his personnel file and would not be not related to any KDEP or EPA employees or to any other persons. (Cx 55.) Complainant requested written notification no later than June 2, if his understanding regarding the May 15, 1994 memo was incorrect. He provided the number where he could be contacted in Sweden for any such response, as he was going there for vacation from May 31 through June 17, 1994. Complainant explained that he would consider that his understanding was accurate "If I don't hear

from you by this time." (Id.)

E. Denial of Computer Equipment and Employee Assistant

During mid-July, 1994, Complainant presented Barnett with a draft of a letter to Kirk Lucius requesting that Complainant be supplied with a more powerful computer. (Tr at 1341-1343.) Barnett asked Complainant to hold off on his request,and asked a staff member to perform a "needs assessment" to determine if the request was truly justified. Complainant subsequently informed her that the matter was taken care of and that she need not get involved, and Barnett thus never received the assessment. (Id.) On September 18, 1994, Complainant sent his own letter to Lucius, formally requesting the computer upgrade. Mr. Lucius discussed Complainant's request with Harold Key who works in the "information management unit." Mr. Key told Lucius that Complainant's request could not be met, and Lucius discussed an alternative arrangement with Complainant, whereby Complainant could alter his work hours and make use of a computer already in the office. (Cx 110 at 116-117.)

Also in mid-July, 1994, Complainant met with Shepherd and Barnett to request authorization to hire a summer employee. Complainant had previously worked with an assistant, Aaron Keatley, from July through December, 1993. This request was denied. (Rx 32.)

F. The "NEPA" Report

Complainant authored a report, spanning 83 pages, titled "Proposal to invoke the National Environmental Policy Act" dated November 15, 1994. (Rx 106.) The report's stated purpose is to "request that the U.S. Environmental Protection Agency ... Region III and other Federal agencies invoke the National Environmental Policy Act (NEPA) and on behalf of the proposed action, formally begin the process of performing an Environmental Assessment (EA) and an Environmental Impact Statement (EIS)." (Id. at 8.) The "proposed action" to which the report refers is "Construction and Operation of Huntsman Chemical Corporation Facilities, Neal, Wayne County, WV." (Id. (cover))

On November 10, 1994, Barnett met with Complainant to explain his concerns he had about the report. Barnett reminded Complainant that his role as coordinator for TSI was to bring about a consensus among the Steering Committee, rather than take unilateral action. He pointed out that the West Virginia officials on the committee had not made any decision to request that NEPA be invoked, and Barnett claims that Complainant in fact indicated that West Virginia did not support NEPA invocation. Barnett thus instructed Complainant to consult the Steering Committee before distributing the draft of the report, and Barnett testified that Complainant agreed that "I had made some good points and that he would go back

and confer with members of the Steering Committee, and who I was particularly concerned about is making sure that West Virginia concurred in this action to send a report." (Tr at 1354.) Nonetheless, the report appeared in a Charleston West Virginia newspaper before West Virginia received a copy for review, (Tr at 1420-1422), and Complainant released a copy of the draft to members of the Citizens Advisory Committee, in addition to the Steering Committee. (Tr at 1356-1357.)

The Huntsman Chemical Plant was never built, and Complainant in fact testified that he had no knowledge as to whether the plans to consider its construction were ever even finalized. (Tr at 797.)

During the summer of 1994, Barnett told Franzmathes "unofficially" that he anticipated that Kentucky would not request that Complainant's IPA be renewed, and that Franzmathes should begin looking for a position for Complainant. In October, 1994, at a conference in Bailouts, Mississippi, Barnett told Franzmathes that the decision not to renew the IPA was official because KDEP had decided to "institutionalize" the position, by creating a permanent merit system position to ensure continued support for the Geographic Initiatives. Franzmathes informed Complainant that his IPA was not going to be renewed on November 18, 1994. (Tr at 1335.) At that time, Franzmathes discussed an opportunity to work on a project, based out of Atlanta, Georgia, providing "technical assistance to developing countries in how to dispose of solid waste." (Cx 111 at 77.)

II. ANALYSIS

A. PROTECTED ACTIVITY

Complainant alleges that his IPA was not renewed and that he was subjected to a hostile work environment due to his protected activities. Specifically, Complainant alleges that he engaged in protected activity when he: (1) provided EPA and KDEP with the Stockwell Brief; (2) informed KDEP that he intended to file an environmental whistleblower suit after he was allegedly harassed based on the Dr. Stockwell situation; (3) requested to provide information to the EPA for a Superfund enforcement action; (4) wrote and distributed numerous documents related to potential environmental problems within the tri-state area; (5) provided information to citizens groups, environmental advisory committees and other state environmental agencies regarding his concerns for the environmental health and safety of the tri-state region; and (6) complained to his management about environmental concerns and his unfair treatment. (Complainant's Pre-Hearing Statement at 5-6.)

KDEP responds that if Complainant had taken these actions in the appropriate manner, his conduct might have been protected.

However KDEP argues that Complainant's actions were not protected because he was not authorized to write and distribute the documents in question as official state reports, he disobeyed valid instructions from his supervisors, he drafted letters encouraging criticisms of Kentucky officials, he released confidential state documents to media representatives and citizens groups, and spent inappropriate amounts of time on controversies far removed from his job responsibilities. (Respondent's Pre-Hearing Statement at 36-37.)

Complainant contends that an employer may respond to the conduct of the employee in raising a protected complaint only when that conduct is "indefensible under the circumstances." (ClBrII at 9, citing Oliver v. Hydro-Vac Services, Inc., 91-SWD-1 slip op. at 17 (Sec'y November 1, 1995)). Indeed, in several cases involving intemperate and impulsive behavior, the Secretary has recognized that "it is normal for employees engaging in protected activities to exhibit impulsive behavior and that such employees may not be disciplined for insubordination so long as their behavior is lawful and their 'conduct is not indefensible in its context.'" Sprague v. American Nuclear Resources, Inc., 92-ERA-37 slip op. at 9 (Sec'y December 1, 1994) (citing Kenneway v. Matlock, Inc., 88-STA-20 slip op. at 6 (Sec'y June 15, 1989).

Importantly, however, the Secretary has more generally and consistently pointed out that "an employer may take action against an employee for improper conduct in raising otherwise protected complaints." Oliver v. Hydro-Vac Services, Inc., 91-SWD-1 slip op. at 17 (Sec'y November 1, 1995) (citing Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 slip op. at 19-20 (Sec'y July 26, 1995); Garn v. Toledo Edison Co., 88-ERA-21 slip op. at 6 (Sec'y May 18, 1995)); Sprague v. American Nuclear Resources, Inc., 92-ERA-37 slip op. at 8-10 (Sec'y December 1, 1994). The fact "that employees are protected while presenting safety complaints does not give them carte blanche in choosing the time, place and/or method of making those complaints." Garn v. Toledo Edison Co., 88-ERA-21 slip op. at 6 (Sec'y May 18, 1995); Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 (Sec'y July 26, 1995). See also Dunham v. Brock, 794 F.2d 1037, 1041 (5th Cir. 1986). Rather "the employee conduct [must] be reasonable in light of the circumstances, and ... the employer's right to run his business must be balanced against the rights of the employee to express his grievances." Jefferies v. Harris Cty. Community Action Ass'n, 615 F.2d 1025, 1036 (1980) (citing Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222, 230-234 (1st Cir. 1976)) (cited with approval in Bassett v. Niagara Mohawk Power Co., 86-ERA-2 (Sec'y September 28, 1993)). See also Lajoie v. Environmental Management Systems, Inc., 90-STA-31 slip op. at 10-14

(Sec'y October 27, 1992)[7].

At the outset, I note that none of Complainant's alleged protected activities were accompanied by any intemperate or impulsive behavior in this case. The Stockwell Brief was approximately 17 pages when Complainant mailed it to Dr. Stockwell, (Rx 59), and was approximately 61 pages, including attachments, in its "revised" form[8], (Rx 60). The NEPA report, regarding the Huntsman Chemical Plant, spanned approximately 83 pages. (Rx 106.) Admittedly, Complainant spent "a significant portion" of his time "preoccupied" with obtaining the services of Dr. Stockwell. (Cx 33.) Such calculated and protracted activities can be considered neither impulsive nor intemperate, and therefore Complainant's manner need not be "indefensible under the circumstances" in order to be responded to by his supervisors. Cf. Oliver v. Hydro-Vac Services, Inc., 91-SWD-1 slip op. at 17 (Sec'y November 1, 1995); Sprague v. American Nuclear Resources, Inc., 92-ERA-37 slip op. at 9 (Sec'y December 1, 1994); Kenneway v. Matlock, Inc., 88-STA-20 slip op. at 6 (Sec'y June 15, 1989); Garn v. Toledo Edison Co., 88-ERA-21 at p.6 (Sec'y May 18, 1995); Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 (Sec'y July 26, 1995); Dunham v. Brock, 794 F.2d 1037, 1041 (5th Cir. 1986).

KDEP management has expressed several legitimate, nondiscriminatory business concerns which must be balanced against Complainant's right to express his own environmental concerns. Bassett v. Niagara Mohawk Power Co., 86-ERA-2 (Sec'y September 28, 1993); Lajoie v. Environmental Management Systems, Inc., 90-STA-31 slip op. at 10-14 (Sec'y October 27, 1992). For example, KDEP has a legitimate, nondiscriminatory business interest in ensuring that documents which reasonably appear to be official KDEP-sanctioned or KDEP-supported documents accurately reflect the position of KDEP management. KDEP management also has a related legitimate, nondiscriminatory business interest in cultivating a cooperative relationship with the EPA, rather than antagonizing EPA management by intervening on behalf of an employee who has a grievance of some sort with EPA management. Although Complainant has a protected right to so intervene, and aid in the administrative investigation of Dr. Stockwell's grievance, and to express his own environmental concerns to whomever he subjectively deems appropriate, he does not have a protected right to do so on behalf of KDEP, if KDEP management does not share his concerns. More importantly, KDEP has a legitimate, nondiscriminatory business interest in ensuring that

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[7] I note that the Secretary has considered cases under both Title VII and the National Labor Relations Act relevant authority in assessing the manner in which an employee conducts his protected activities. Lajoie; Bassett.

[8] It appears that "revision #4" of the brief, Rx 60, was never in fact released to anybody.

an "employee's conduct in protest of an unlawful employment practice," or environmental violation, does not "so interfere with the performance of his job that it renders him ineffective in the position for which he was employed." Jones v. Flagship Int'l, 793 F.2d 714, 728 (5th Cir. 1986) (quoting Rosser v. Laborers" Int'l Union, Local 438, 616 F.2d 221, 223 (5th Cir.), cert. denied 449 U.S. 886 (1980)). See also Smith v. Texas Dept of Water Resources, 818 F.2d 363, 366 (5th Cir. 1987). Cf. EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1013 (9th Cir. 1983).

Notwithstanding the arguments of the parties, Complainant's actions while Project Coordinator need not be deemed "entirely protected" or "entirely unprotected." See Bassett, slip op. at 6. Rather, I find that the manner in which he conducted the allegedly protected activities central to this litigation (most importantly, the Stockwell controversy, the EPCRA letter, and the NEPA report) implicates the above nondiscriminatory, legitimate business concerns of KDEP management. Therefore, Complainant's activities had both unprotected and protected aspects. To the extent that KDEP management reasonably responded to the legitimate, nondiscriminatory business concerns, they did not violate the environmental whistleblower protection provisions. Id. Should Complainant prove, by a preponderance of the evidence, however, that KDEP's responses were truly motivated by the protected aspects of his activities, Complainant may establish a violation. See Jackson v. Ketchikan Pulp Co., 93-WPC-7/8 at pp. 4-5 n.1 (Sec'y, March 4, 1996). Furthermore, "the employer bears the risk that the influence of legal and illegal motives cannot be separated," Sprague, slip op. at 11; Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1164 (9th Cir. 1984); Guttman v. Passaic Valley Sewerage Comm'rs, 85-WPC-2 slip op. at 19 (Sec'y March 13, 1992), aff'd sub nom. Passaic Valley Sewerage Comm'rs v. United States Dept. of Labor, 992 F.2d 474 (3d Cir. 1993), in which case the traditional "dual motive" analysis applies[9].

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[9] Under such an analysis, once the Complainant proves by a preponderance of the evidence that Respondent was motivated at least in part by protected activity, the burden shifts to the Respondent to demonstrate by a preponderance of the evidence that the same actions would have been taken absent the illegitimate motive. Sprague v. American Nuclear Resources, Inc., 92-ERA-37 slip op. at 11 (Sec'y December 1, 1994); Dartey v. Zack Co. of Chicago, 82-ERA-2 slip op. at 9 (Sec'y April 25, 1983); Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989). As discussed below, however, a dual motive analysis does not apply in this case, since KDEP responded solely to the unprotected aspects of Complainant's activities, taking care to safeguard his rights to engage in the protected activity in the proper manner.

B. ALLEGED RETALIATION

1. Hostile Work Environment

Complainant alleges in part that he was subjected to a "hostile work environment" consisting of harassment and other retaliatory acts by the Respondent, on the basis of protected activity.

The Secretary has found that the principles governing Title VII hostile work environment claims, as stated by the Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) and Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993), are equally applicable to hostile work environment claims under the environmental whistleblower statutes. Varnadore v. Oak Ridge National Laboratory, 92-CAA-2/5, 93-CAA-1 (Sec'y, January 26, 1996); See also English v. General Electric Co., 858 F.2d 957 (4th Cir. 1988). The Secretary noted the following necessary elements to a claim of hostile work environment under Title VII:

(1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;

(2) the discrimination was pervasive and regular;

(3) the discrimination detrimentally affected the plaintiff;

(4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and

(5) the existence of respondeat superior liability.

Id., citing West v. Philadelphia Electric Co., 45 F.3d 744 (3d Cir. 1995). Tailoring the first of these elements to environmental whistleblower claims, the Secretary explained that Complainant must prove that he or she suffered intentional retaliation as a result of protected activity. Id.

In the instant case, I find that KDEP's alleged retaliatory responses to Complainant's preparation of the Stockwell Brief, the NEPA report, and the EPCRA letter, were not based on protected activity. Rather, I find that Barnett and Shepherd carefully and tailored their various admonishments to the unprotected manner in which he conducted his activities, and unequivocally conveyed the message to Complainant that he was free to pursue his protected concerns in a reasonable and protected manner.

With respect to the Stockwell situation, I note that Barnett and Shepherd responded only by instructing Complainant not to represent his own views, regarding the facts and EPA's motivations, as an official position of the State of Kentucky. (See e.g., Tr at

297.) I further note that Barnett in fact sought to facilitate Complainant's involvement in the reasonable and appropriate manner, by calling John Hankinson, EPA Region 4's Regional Administrator to assure him that Complainant would be available to answer any questions regarding the Stockwell situation. (Tr at 1299-1300.) Shepherd's uncontested testimony also indicates that he told Complainant "he had every right" to assist with the investigation of the Stockwell matter in the appropriate manner, "without misrepresenting that his views were the views of the Kentucky Department for Environmental Protection ... [which was] the misrepresentation that was implicit in the document he created that was the fundamental source of concern." (Tr at 297.)

I find, in addition, that Complainant's Stockwell Brief, albeit unintentionally, reasonably appears to represent an official KDEP position to the unsuspecting, casual reader. The cover of the brief unequivocally notes that it was prepared by the KDEP Commissioner's Office. Moreover, Miller misinterpreted the document as an official KDEP position, as reflected by his inquiry to Shepherd upon discovering the brief. Barnett and Shepherd were both careful to impress upon Complainant that it was this misleading aspect of the document, as well as their lack of information regarding its accuracy, and not complainant's assistance with the Stockwell investigation itself, that concerned them.

Similarly, Complainant's EPCRA letter may have had a protected aspect to it, in that it expressed a desire to aid in a Superfund enforcement proceeding. However the method which Complainant chose to request such involvement was again inappropriate, as he represented that KDEP, as a state agency, desired "formal involvement in the negotiation process," when in fact KDEP had no desire to intervene "formally" and the proceeding involved no violations in Kentucky. Although Complainant presumably did not intentionally misrepresent KDEP's desired involvement in the request or the nature of the request, I find it was that aspect of the letter which KDEP sought to redress, and KDEP's reaction was not based on the protected aspect of the letter. Again, KDEP did not prevent or attempt to prevent Complainant from providing the relevant information regarding Ashland Oil to Deutsch from EPA Region 4, but rather expressed concern with Complainant's use of the term "formally involved" in a message on state letterhead, as it created the false impression of official state action, while Kentucky had no authority whatsoever regarding the settlement negotiations.

Barnett similarly limited his response to Complainant's NEPA report, regarding the Huntsman Chemical Plant, to his concern that Complainant used his official position with Kentucky as Coordinator to take action which neither the Steering Committee nor Kentucky authorized or, in fact, approved of. Complainant as a fact identified himself on the report's cover as "Coordinator, Tri-State

Geographic Initiative," for "U.S. Environmental Protection Agency, Region IV," and "Kentucky Department for Environmental Protection." Yet the report itself acknowledges that it "was written under the sole initiative of Brian Holtzclaw," it "was not commissioned by the U.S. EPA Region III, or any particular supervisor," and it "represents the findings of the writer and does not necessarily reflect the opinions of the U.S. Environmental Protection Agency Region IV and the Kentucky Department of Environmental Protection." (Rx 106.)

Complainant also relies on the May 13, 1994 memorandum from Barnett, (Cx 51), as evidence of unlawful retaliation. Complainant had admitted that a "significant portion" of his time was "preoccupied" with obtaining the services of Dr. Stockwell and that this "unexpectedly demanding" endeavor "took time from other aspects of managing the risk screening, air toxics, pollution prevention, and surface water projects." (Cx 33.) Keatley's hearing testimony confirmed that Complainant had spent approximately 70% of his time during the fall of 1993 on the Stockwell matter, (Tr at 1099), and Barnett had recently been confronted with Complainant's EPCRA letter. Since only the unprotected aspects of these events troubled Barnett, I find that this memo expresses a reasonable, nondiscriminatory, legitimate concern that Complainant had been neglecting his true responsibilities as Coordinator, and that his inappropriate manner in promoting his whistleblowing activities had begun to "so interfere with the performance of his job that it render[ed] him ineffective in the position for which he was employed." See Jones v. Flagship Int'l, 793 F.2d 714, 728 (5th Cir. 1986) (quoting Rosser v. Laborers" Int'l Union, Local 438, 616 F.2d 221, 223 (5th Cir.), cert. denied 449 U.S. 886 (1980)). Therefore, rather than unlawful retaliation, I find that the May 13, 1994 memorandum represents a nondiscriminatory, reasonable and legitimate attempt to urge Complainant to refocus on the tasks for which he was hired.

In summary, Complainant has failed to prove that he suffered any retaliation as a result of any protected aspect of his actions while Coordinator. Rather, Barnett and Shepherd lawfully and reasonably responded to various unprotected aspects of Complainant's activities, raising reasonable, non-discriminatory, legitimate business concerns regarding Complainant's performance of his duties. Therefore, Complainant's claim that he was subjected to a "hostile work environment" consisting of harassment and other retaliatory acts must fail. Varnadore, Philadelphia Electric Co., supra.

2. Non-Renewal of Complainant's IPA

Complainant also alleges, more specifically, that KDEP unlawfully failed to renew his IPA in violation of the environmental whistleblower provisions. KDEP argues that Complainant's IPA was not renewed because they decided during the

summer of 1994 to "institutionalize" the Coordinator position, changing it from an IPA-staffed position to a permanent merit system position, in order to ensure continued support for the initiatives after the administration left office in December, 1995. KDEP also asserts that it had independent reasons for not renewing Complainant's assignment because of his poor work performance, his disobedience of instructions from his supervisor, his poor working relationships with other essential colleagues, and his gross misconduct as abundantly documented while Complainant was employed in Kentucky.

Complainant bears the burden of proving by a preponderance of the evidence that his IPA was not renewed because of protected activities. Jackson v. Ketchikan Pulp Co., 93-WPC-7/8 slip op. at 4-5 n.1 (Sec'y, March 4, 1996). Therefore, Complainant must "establish that the employer's proffered reason[s] are pretextual by establishing either that [an] unlawful reason, ... protected activity, more likely motivated [the employer] or that the employer's proffered reason[s] [are] not credible and that the employer discriminated against him." Bechtel Const. Co. v. Secretary of Labor, 50 F.3d 926, 934 (11th Cir. 1995) (aff'g Nichols v. Bechtel Construction Inc., 87-ERA-44 (Sec'y October 26, 1992)). If Complainant successfully establishes that KDEP's proffered explanations are pretextual, Complainant must further establish that the true reason for the decision was his protected activity. See St. Mary's Honor Center v. Hicks, -- U.S. --, 113 S.Ct. 2742 (1993); Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y February 15, 1995).

KDEP has essentially asserted two general motivations behind their decision not to renew Complainant's IPA: (1) the desire to "institutionalize" the Coordinator position and (2) various other concerns about Complainant's work performance.

Complainant has failed to prove any pretext with regard to KDEP's desire to change the Coordinator position from an IPA-staffed position to a permanent merit system position, in order to ensure continued support for the initiatives after the administration left office in December, 1995. The Coordinator duties were performed by a full time state employee, Dr. Morgan, prior to Complainant taking over. Shepherd's uncontroverted testimony explained that "a very stringent hiring freeze" was in effect when [Dr. Morgan was promoted] and [Complainant] took over the Coordinator position, and therefore KDEP was "not able to hire and fill vacancies without a very elaborate process and very strong justification." (Tr at 276.) Barnett, having himself originally worked for Kentucky under an IPA, suggested such an arrangement to Shepherd. Complainant was thus hired under an IPA for a limited, although renewable, 2 year term.

Shepherd determined, in the summer of 1994, that the position should return to a full time state employee, because "if the

staffing of that project was totally dependent on the use of a federal employee on loan to Kentucky, that ... would be counterproductive to the overall success of the project and it would be quite easy and more likely that that kind of project would be terminated upon a change in state administrations, which was ... a little over a year off at that point." This decision was reached in the context of a larger structural reorganization which took place within the Cabinet for Natural Resources and Environmental Protection. (Tr at 166, 318, 1334-1335.)

By the time of the hearing, the reorganization was in fact completed, and a new "environmental control manager" position was established, (Rx 72; Tr at 1202), with responsibility "for the coordination of all inter-governmental activities ... a single point of contact who would oversee projects that involve joint ventures between the state and the federal EPA or other states or other state agencies." (Tr at 322.) Another state employee was subsequently hired to manage the geographic initiatives directly. (Tr at 322-323; 1201-1203.)

In sum, there is no evidence in the record to undermine the bona fides of this legitimate, non-discriminatory justification for KDEP's decision not to renew Complainant's IPA. In fact Complainant's own witness, Richard Bady, who works as a research coordinator for the Ohio Valley Environmental Coalition, which was involved on the Citizens Advisory Committee for TSI, observed the difficulties created by the lack of a continuous employee in the Coordinator position, explaining:

> It took a long time to put all this data together. The monitoring resulting from this was just starting to begin to happen ... and ... as soon as [Complainant] did leave, six or eight months pass with nothing whatsoever happening ... [D]elays like this are what we've been concerned about all along. There have been other cases with the -- we already experienced one person being in charge, Mr. Morgan, we thought things would start to happen and suddenly he's gone, so there are great delays. Another person comes in, finally gets things going, and just when his efforts are about to bear fruit, he's gone. There is a ... pattern there that concerns us.

(Tr at 207-208.) I find that Complainant has not demonstrated that the desire to fill the Coordinator position with a permanent state employee is a pretextual justification.

KDEP also argues that it "had independent reasons for not renewing [Complainant's] assignment because of his poor work performance, his disobedience of instructions from his supervisor, his poor working relationships with other essential colleagues, and his gross misconduct as abundantly documented." (RBrII at p. 7.) I have concluded that KDEP's concerns over Complainant's treatment

of the Stockwell situation, the NEPA report, and the EPCRA letter are not tantamount to protected activity, supra. p. 20. Rather, KDEP responded to legitimate, non-discriminatory and unprotected aspects of the manner in which Complainant performed his activities. Therefore, to the extent KDEP relied on these factors in deciding not to renew Complainant's IPA, that decision did not violate the environmental whistleblower provisions.

Thus, I find that Complainant has failed to show that Respondent's legitimate, nondiscriminatory business concerns, which allegedly motivated the decision not to renew his IPA, are pretextual. More specifically, I find that Barnett and Shepherd decided not to renew Complainant's IPA based on the genuine belief that the Coordinator position should be institutionalized, as well as their dissatisfaction with certain unprotected aspects of Complainant's job performance regarding the Stockwell situation, the EPCRA letter, and the NEPA report. Therefore, I need not resolve the conflicting evidence regarding Complainant's overall job performance or working relationships with his colleagues, as Complainant has failed, in any event, to prove by a preponderance of the evidence, that the aspects of his activities which are protected by the environmental whistleblower protection provisions motivated the decision not to renew his IPA.

C. CONCLUSION

Based upon the foregoing, I conclude that Complainant has failed to establish that KDEP declined to renew his IPA, or otherwise retaliated against him, due to activity protected by the environmental whistleblower protection provisions of the Clean Air Act, 42 U.S.C. section 7622; the Safe Drinking Water Act, 42 U.S.C. section 300j-9; the Solid Waste Disposal Act, 42 U.S.C. section 69713; the Water Pollution Control Act, 33 U.S.C. section 1367; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. section 9610; and the Toxic Substances Control Act, 15 U.S.C. section 2622.

RECOMMENDED ORDER

For the reasons stated above, it is recommended that the Complaint of Brian L. Holtzclaw be dismissed in its entirety.

Ainsworth H. Brown
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative

file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. **See** 55 Fed. Reg. 13250 (1990).